IN THE

Supreme Court of the United States

October Term, 1924. No. 769.

CHEUNG SUM SHEE *et al.*,

v.

JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco

ON CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Motion for Leave to file Brief as *Amicus Curiae*, and Proposed Brief of *Amicus Curiae*

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Outline of Argument.

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CHEUNG SUM SHEE *et al.*, *against* JOHN D. NAGLE, as Commissioner of Immigration for the Port of San Francisco.	No. 769.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE;*

Also

BRIEF SHOWING THAT QUESTION CERTIFIED BY THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT SHOULD BE ANSWERED IN THE NEGATIVE.

Now comes HENRY W. TAFT, an attorney and counsellor of this Court, and represents that there is involved in the above entitled case a question arising under the Immigration Act of 1924, approved May 26, 1924 (43 Stat. 153, c. 190), certified to this Court under Judicial Code, Section 239, the answer to which will vitally affect the interests and status of a number of his clients, who would be prejudiced by a decision affirming the posi-

tion taken below in the above entitled case by the Commissioner of Immigration and by the Government.

Therefore, he prays leave to file a brief and argument as *Amicus Curiae* to the end that the question certified by the Circuit Court of Appeals for the Ninth Circuit be answered in the negative. He is permitted by Counsel for the petitioners herein and by Counsel for the Government to say that they have no objection to the granting of such leave.

The brief and argument proposed to be submitted is as follows:

Statement.

In the decision below the District Court for the Northern District of California, Second Division, denied the right of entry into the United States of wives and minor children of Chinese merchants who were themselves not eligible to citizenship, but who were lawfully domiciled in the United States. The ground for the exclusion of the petitioners was based by the Court upon the provisions of Sections 5 and 13 (c) of the Immigration Act of 1924 [2 Fed. (2d) 995].

On appeal the Circuit Court of Appeals for the Ninth Circuit did not decide the case, but certified to this Court the question, viz: "Are the alien Chinese wives and minor children of Chinese merchants who were lawfully domiciled within the United States prior to July 1st, 1924, such wives and children now applying for admission, mandatorily excluded from the United States under the provisions of the Immigration Act of 1924?" (Rec., p. 2).

The answer to the question certified involves a consideration of the following question:

> Is there to be deduced from Section 5 and other provisions of the Immigration Act of 1924 (43 Stat. 153, c. 190) an intent on the part of Congress

to nullify the provisions of the Treaty of November 17, 1880 (22 Stat. 826) between the United States and China, to the extent of denying the right of entry to the wife and children of a Chinese merchant, he himself being admissible though an alien ineligible to citizenship, which they had previously enjoyed under the said Treaty?

POINT I.

The petitioners had a right to enter the United States under the Treaty with China of 1880, and the Immigration Act of 1924 does not show an intent on the part of Congress to impair that right.

1. Treaty rights prior to the passage of the Act of 1924.

The relevant portion of the Chinese Treaty of 1880 is Article II (22 Stat. 827):

> "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation."

This Treaty must be read in connection with the Treaty of Commerce and Navigation of 1903 (33 Stat. 2215), by Article XVII of which it is virtually incorporated by reference. The provisions of the Treaty have been recognized by the Department of State and the Department of Labor as constituting a treaty of "commerce and navigation" within the meaning of Clause (6) of Section 3 of the Immigration Law of 1924 which excepts from the exclusion provision of the law "an alien entitled to

enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." (See Circular, Bureau of Immigration, August 7, 1924, entitled "Chinese General Order No. 4", under caption of "Non-Immigrants").

Prior to the passage of the Immigration Act of 1924 the question was presented whether, under Article II of the Treaty of 1880, *supra,* wives and children of Chinese merchants were entitled to the privileges conferred by the Treaty upon the merchants themselves. This question was answered in the affirmative by this Court in *United States* v. *Mrs. Gue Lim,* 176 U. S. 459 (1900). The Court took the broad view that

> "it is not possible to presume that the treaty, in omitting to name the wives of those who by the second article were entitled to admission, meant that they should be excluded." (p. 466).

The Court, after referring to a divergence of views on the part of Federal District Judges who had had to pass on the question, expressly approved the line of reasoning pursued by DEADY, D. J., in the case of *In re Chung Toy Ho,* 42 Fed., 398 (C. C., Ore., 1890). In that case Judge Deady, after referring to the intention of Congress in passing the Chinese Exclusion Act of 1884 (23 Stat. 115), which was designed to carry the Treaty of 1880 into effect, and after pointing out that under that Treaty a Chinese merchant might bring his "body and household servants" with him into the United States, said (pp. 399-400):

> "It is impossible to believe that parties to this treaty, which permits the servants of a merchant to enter the country with him, ever contemplated the exclusion of his wife and children. And the reason why they are not expressly mentioned, as entitled to such admission, is found in the fact

that the domicile of the wife and children is that of the husband and father, and that the concession to the merchant of the right to enter the United States, and dwell therein at pleasure, fairly construed, does include his wife and minor children; particularly when it is remembered that such concession is accompanied with a declaration to the effect that, in such entry and sojourn in the country, he shall be entitled to all the rights and privileges of a subject of Great Britain or a citizen of France.

* * * * * * *

"My conclusion is that under the treaty and statute, taken together, a Chinese merchant who is entitled to come into and dwell in the United States is thereby entitled to bring with him, and have with him, his wife and children. *The company of the one, and the care and custody of the other, are his by natural right; and he ought not to be deprived of either, unless the intention of Congress to do so is clear and unmistakable.*" (Italics ours.)

United States v. *Mrs. Gue Lim, supra,* was cited in *Yee Won* v. *White,* 256 U. S., 399, 400 (1921). While the wife and minor children who were the petitioners in that case were excluded because the status of the husband and father had changed from that of merchant to that of laborer, nevertheless the *Gue Lim* case was referred to as one which had established the proposition that the wife of a Chinese merchant could not be excluded under the Treaty, "*since this would obstruct the plain purpose of the Treaty of 1880 to permit merchants freely to come and go*" (p. 401; italics ours).

Such being the situation as regards the Treaty with China at the time of the passage of the Immigration Act of 1924, we turn next to the text of the Act. Later we shall refer to numerous expressions of Congressional intent which without exception support our contention.

2. The text of the Act—an analysis.

Section 3-(6) of the Act excepts from the term "immigrant", as used in the Act, "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation". Under familiar principles of law, Congress must be presumed to have been familiar with the judicial interpretation already alluded to by which the term "merchants" as used in the Treaty of 1880 was held to include wives and children of "merchants". See *Hecht* v. *Malley*, 265 U. S. 144, 153 (1924); *Ex parte Goon Dip*, 1 Fed. (2d) 811, 813 (1924), *post*, p. 23. And under such interpretation the pertinent part of Section 3 of the Act would be equivalent to the following, viz:

> "When used in this Act the term 'immigrant' means an alien departing from any place outside the United States destined for the United States, except * * * an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation, and his wife and children."

The question raised here is whether the treaty rights thus enjoyed by the wife and children of a Chinese merchant before the passage of the Act of 1924 have been taken away by the second sentence of Section 5 of the Act, which provides as follows:

> "An alien who is not particularly specified in this act as a non-quota immigrant or a *non-immigrant* shall not be admitted as a non-quota immigrant or a *non-immigrant by reason of relationship to any individual* who is so specified or by reason of being excepted from the operation of any other law regulating or forbidding immigration." (Italics ours.)

A correct understanding of this provision requires a brief review of the provisions of the Act of 1924 and their general purpose.

Two principles of exclusion of aliens were sought to be put into effect by the statute. These are quite distinct from each other and are based upon independent considerations of policy. Upon the first principle, admissibility of aliens is limited to quotas which are established at fixed percentages of persons who are already lawfully within this country and are of the same nationality or of the same national origin as those seeking admission. The second principle is that of excluding (with certain specified exceptions) aliens "ineligible to citizenship", that class being principally members of Oriental races who are deprived of the right of becoming American citizens because they are not "free white persons" or "aliens of African nativity" or "persons of African descent" (Section 2169 R. S., applied in *Ozawa* v. *United States*, 260 U. S. 178 [1922], *Yamashita* v. *Hinkle*, 260 U. S. 199 [1922], *United States* v. *Thind*, 261 U. S. 204 [1923]).

Most of the elaborate provisions of the Immigration Act of 1924 relate to the first mentioned class. Section 2 relates to immigration visas. Section 3 defines an immigrant, making certain exceptions, including the merchant class already referred to. Section 4 relates to non-quota immigrants, and obviously has no relation to the class who are ineligible to citizenship. Section 5 is entitled "Quota-Immigrants", and we think that an examination of the Act will show that it was intended to apply only to the class referred to in its caption, that is, to "quota-immigrants". Section 6, entitled "Preferences Within Quotas", obviously refers to the Quota system. Section 7, referring to an application for an immigration visa, Section 8 providing for "non-quota" immigration visas, Section 9 entitled "Issuance of immigration visas to relatives", Section 11 entitled "Numerical Limitations", Section 12 entitled "Nationality", Sec-

tion 17 relating to entry from foreign contiguous territory and Section 18 relating to "Unused immigration visas;—all these relate to the Quota system. The only sections of the law which more or less bear upon the question of the exclusion of aliens "ineligible to citizenship", are Section 3 defining the word "immigrant", Section 5 already referred to, Section 13, which is the comprehensive section dealing as its title indicates with "Exclusion from the United States", Section 15 relating to "Maintenance of Exempt Status", Section 28, in which are given general definitions of terms employed in the preceding sections of the act, and possibly Section 25, providing that an alien admissible under some other law "shall not be admitted to the United States if he is excluded by any provision of this Act."

The provisions relating to burden of proof, rules and regulations and penalty provisions, do not affect the question under consideration.

The attempt by Congress to merge in one act provisions for the quota system of exclusion and that based upon ineligibility to citizenship, has led to some confusion in phraseology which requires careful analysis.

Bearing these facts in mind, we first take up the provisions of Section 5.

As we have said the caption of this Section describes it as referring only to "*quota-immigrants*". If its terms relate to that class alone it is logically inserted between Section 4 and Section 6, for Section 4 defines non-quota immigrants and Section 6 describes the preference within quotas, while Section 5 defines "Quota immigrants" as those who are not non-quota immigrants; it does not define "immigrants",—that was done by Section 3. If the title of the section is correct in confining its application to "quota immigrants" then there is an inconsistency in the reference in the second sentence of the section to "a non-immigrant";

for there is not in any of the quota provisions of the entire act any alien subject to the quota provision who could be described as a "non-immigrant", all of those provisions referring solely to immigrants who are either "quota immigrants" or "non-quota immigrants."

But it is upon this use of incongruous terms in section 5 that the principal argument is based that there is an intention by the provisions of the section to nullify the exclusion from the definition of "immigrant" the wives and children of Chinese merchants, although not affecting the status of the merchants themselves. In other words, the claim is that, in spite of the inconsistency of the words in the title and in the body of Section 5, there is to be ascribed to Congress an intention to qualify the exemption under subdivision (6) of Section 3 so as to exclude the wife and children of a Chinese merchant, although "in pursuance of the provisions" of the existing treaties with China, they were admissible as a part of the merchant class. We submit that there is no such "clear and unmistakable" intention to accomplish such a serious result to be implied from the careless use of the word "non-immigrant" in Section 5. (*In re Chung Toy Ho, ante*, p. 4.)

Section 5 had not been formulated in its present form, as we shall more fully show below, when subdivision (6) of Section 3 was inserted in the act; and at that time the provisions of Section 5 would not have had the serious effect of taking away from Chinese merchants and their families treaty rights then enjoyed by them, for by the first exception in Section 3 exemption was extended to the family of a government official, and in the exemptions (2), (3) and (4) the wives and families of the aliens referred to would themselves, without specification and in their own right, come within the exempted classes, while an alien seaman under (5) would

not generally be expected to be accompanied by his wife or family. It was only when, late in the progress of the bill in the House of Representatives and the Senate, subdivision (6) of Section 3 was inserted, and the second sentence of Section 5 was transferred to that section from another quota section, that support was given for the argument now made that a serious curtailment of the treaty rights of the merchant class was intended.

The importance of the relationship provision of Section 5 arose only in connection with the quota system, and the sole machinery for dealing with it was provided for in Section 9 which was clearly a quota section. That section provides for the manner in which visas may be issued to relatives under Section 4, subdivision (a), and to relatives who, under Section 6, are entitled to a preference within the quota. These were the only cases where admission or preference could under the Act be claimed on account of relationship. They are not cases which affect the quota, although they both are properly cared for in a system based on quotas and non-quotas. If the second sentence of Section 5 is interpreted as excluding all persons *dealt with in the quota system* who claim entry by virtue of relationship to persons entitled thereto as non-quota immigrants, we make it consistent with its title "Quota Immigrants" and a natural concomitant of Section 9. And then if Section 13 is treated as containing all the controlling provisions of the act for the exclusion of all aliens intended to be excluded, the incongruities we have referred to will be avoided.

The purpose that Section 13 shall perform the office of providing for all cases of exclusion is indicated in its title, which is "Exclusion from the United States"; and the text of the section itself clearly differentiates between the two systems of exclusion, that is, the quota system, and that for the exclusion of aliens ineligible to citizenship.

Subdivision (a) of Section 13 provides as follows:

> "(a) No immigrant shall be admitted to the United States unless he (1) has an unexpired immigration visa or was born subsequent to the issuance of the immigration visa of the accompanying parent, (2) is of the nationality specified in the visa in the immigration visa, (3) is a non-quota immigrant if specified in the visa in the immigration visa as such, and (4) is otherwise admissible under the immigration laws."

Obviously this is intended as a comprehensive provision for the exclusion of all those who have not complied with the quota provisions of the law. Subdivisions (b), (d) and (e) deal with temporary and special cases and need not be especially referred to.

Subdivision (c) provides as follows:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of subdivision (b), (d), or (e) of section 4, or (2) is the wife, or the unmarried child under eighteen years of age, of an immigrant admissible under such subdivision (d), and is accompanying or following to join him, or (3) is not an immigrant as defined in section 3."

Section 4 makes no distinction between immigrants who are and those who are not eligible for citizenship. Its office is solely to exclude from the *quota count* certain specified classes. But the classes mentioned in subdivisions (b), (d) and (e) of Section 4 might be "ineligible to citizenship" although under some earlier law or treaty they were lawfully in this country.* Hence it was neces-

*It is well known that prior to the passage of the Chinese Exclusion Act (23 Stat. 115, c. 220), there were thousands of aliens in this country who were incapable of being naturalized. This appears from the observations of this Court in the *Chinese Exclusion Case*, 130 U. S. 581, 594-596 (1889), read in the light of decisions under U. S. R. S. Sec. 2169, such as *In re Ah Yup*, 5 Sawyer 155 (C. C. Cal., 1878).

sary to except them from the exclusion provision of Section 13, to avoid conflict between the two sections.

If Subdivision (c) of Section 13 be amplified by the inclusion of the pertinent provisions of Section 3 it would read:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien is 'entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.' "

Thus interpreted Section 13 would include the wife and children of a Chinese merchant. Such an interpretation would effect what its caption indicates, that is, "exclusion from the United States" in *all* cases in which exclusion is intended. If then Section (5) is construed, as *its* title indicates, as applicable only to "quota immigrants," the two sections are not inconsistent but provide the necessary parts of a harmonious scheme.

It is true that this interpretation requires a rejection of the words "a non-immigrant" in Section 5 as being inapplicable to one of the "non-immigrants" excepted from the provisions of Section 3, that is, an alien of the merchant class provided for in subdivision 6 of the latter section. But it would still be applicable to those cases provided for in subdivisions (2), (3), (4) and (5) of Section 3, because, first, those were, as we shall point out, the only provisions in the section when Section 5 were first drafted, and, second, because in no one of those four exceptions is a case presented in which within the reasoning of the decisions of the Court in relation to the merchant class, Congress could be deemed to have intended to include the wives or the families unless they were specified. The same cannot be said in relation to subdivision (6) and in spite of the language of Section 5, that subdivision can reasonably be read to mean that an alien merchant was to enjoy all

of the rights conferred upon him by any existing treaty of commerce and navigation, including the right, as the Chinese treaty had been interpreted by the courts, of having the company of his wife and children because they were of the merchant class. It would not do violence to canons of statutory interpretation to say that when Congress excepted from the class of immigrants alien merchants, the wives and children of aliens were "*particularly specified in this act*" and were, therefore, not within the prohibition of the second sentence of Section 5. Without recourse to close or highly technical reasoning, the Courts practically have said that the family of a Chinese merchant *are themselves members of the merchant class.* In *United States* v. *Mrs. Gue Lim,* 176 U. S. 459 (1900), *ante,* p. 4, for instance, this Court held that the clause in the Chinese Exclusion Treaty providing for the admission of "Chinese * * * merchants * * * together with their body and household servants * * *" should be construed to include the wife and minor children of Chinese merchants. If the same liberality of interpretation is applied to the provisions of the Immigration Act of 1924, and weight is given to the humane considerations which have influenced the courts on former occasions in interpreting the Chinese Exclusion Act, there should be no difficulty in so construing the Act of 1924 as not to impair the treaty rights of wives and children of Chinese merchants. And such an interpretation would be consonant with the general principle that when a statute admits of either of two constructions, one restrictive of rights that may be claimed under a treaty, and the other favorable to them, the latter is to be preferred. *Cf. Chew Heong* v. *United States,* 112 U. S. 536, 549-550 (1884); *Asakura* v. *City of Seattle,* 265 U. S. 332, 342 (1924).

Nothing in *Commissioner of Immigration* v. *Gottlieb,* 265 U. S. 310 (1924), militates in any way against the liberal construction of the Act of 1924 hereinabove con-

tended for. In the first place, the *Gottlieb* case involved no treaty whatsoever; in the second place, an express provision in the 1917 Act (39 Stat. 874, c. 29) exempted from the excluding provisions "ministers * * * their legal wives or their children" only when such ministers were immigrating from the barred Asiatic zone, whereas Gottlieb came from Palestine. Nor could Gottlieb successfully invoke the 1921 Acts (42 Stat. 5, c. 8; 42 Stat. 540, c. 187), since the pertinent exemption of these acts applied to "ministers of any religious denomination" without mentioning their wives and children; and neither the other provisions of the Act of 1917 nor its legislative history justified a construction of the statute more broad than its plain language required.

3. The Legislative History of the Immigration Act of 1924.

If there is any reasonable doubt as to the meaning of the Immigration Act of 1924, recourse may be had to the committee reports and to the explanatory statements made before Congress by committee members for the purpose of showing the real intention of Congress. *United States* v. *St. Paul M. & M. Ry. Co.*, 247 U. S., 310, 318 (1918); *Duplex Printing Press Co.* v. *Deering*, 254 U. S., 443, 475 (1921); *United States* v. *Bhagat Singh Thind*, 261 U. S., 204, 214 (1923).

A. The provision excluding aliens ineligible to citizenship was embodied as Section 12, then entitled "Exclusion from United States", in the original bill as reported by the Immigration Committee of the House on February 9, 1924 (H. R. 6540). The bill did not at that time contain the second sentence of Section 5, which was then entitled "Quota Immigrants" and provided only that "When used in this Act the term 'quota immigrant' means any immigrant who is not a non-quota immigrant". The bill as introduced in the Senate, did not contain any provision relating to the exclusion of aliens ineligible to citizenship. (See Section 3, S. 2576, page

5, and Congressional Record, Vol. 65, page 5415). The only section in that bill relating to exclusion related (1) to the case of an immigrant requiring a visa under the quota system, and (2) to legally admitted immigrants temporarily leaving the United States. It did contain, however, *but in a form which made it applicable solely to the quota system,* the provision which afterwards became the second sentence of Section 5. It was then embodied in Section 3, the caption of which was, "Definition of Immigrant", and was as follows (draft of February 16, 1924, p. 5):

> "No person, who himself is not within any of the exceptions specified in this section, *shall be excepted from the quota restrictions created by this Act by reason of his relationship to any person who is so excepted* or by reason of being excepted from the operation of any other law regulating or forbidding immigration." (Italics ours.)

It is significant that this relationship clause was not made applicable to aliens not eligible to citizenship for at that time Section 3, in its definition of an immigrant, made an exception of "an alien entitled to enter the United States under the provisions of a treaty." Clearly, therefore, in its origin the relationship provision was intended to be a feature of the quota system alone. (See S. 2576, 68th Congress, First Session, February 16, 1924). Not until April 2, 1924, was the provision, slightly amended, but substantially in the same form, agreed to in the Senate. (Congressional Record, Vol. 65, page 5418).

This view of the matter is confirmed by the Report of the House Committee on Immigration, page 4, (No. 176, 68th Congress, First Session, to accompany H. R. 6540, dated February 9, 1924).

In defining the difference between quota immigrants and non-quota immigrants the Committee said (p. 9):

> "As hereinbefore noted, the bill provides for admission of certain alien immigrants as 'non-

> quota immigrants' exempt from count under all quota limitations. But the 'non-quota immigrant' as well as the 'quota immigrant' must obtain an immigration certificate. And *if he claims to be a non-quota immigrant by reason of relationship* to a citizen of the United States (as in subdivision (a) of Sec. 4), his immigration certificate is issuable only after his case has received consideration in the Bureau of Immigration upon petition filed by the relative whom he proposes joining in the United States."

Upon proof of compliance with the preliminaries provided for in the bill the Commissioner General of Immigration was to "authorize the consul to issue a 'non-quota' immigration certificate to the intending immigrant," that is to the one claiming by virtue of relationship. (Report, p. 10). There is no intimation that the provision was to apply to an alien who was not, under Section 3, an immigrant.

In the Report (No. 350, 68th Congress, First Session) of the House Committee on Immigration and Naturalization (committed to the Committee of the Whole House on March 24, 1924), the Committee repeated that the relationship provision of the bill (H. R. 7995) was intended to be applied only to non-quota immigrants (Report, p. 18).

Finally, the Report (No. 716, 68th Congress, First Session, May 12, 1924) of the Managers on the part of the House in the Committee of Conference reported back the bill (H. R. 7995) and *for the first time there appeared the second sentence of Section 5.* There was no statement of the reason for its insertion. If it had been the intention to extend the application of the relationship provision, which up to this point had clearly been confined in its application to immigrants who came within the quota provision of the statute, the managers would surely not have omitted some explanation of such a radical change. It is incredible that after it had been repeatedly stated, as we shall show that it was, both in the House and in the Senate, that treaty rights of persons had been fully

protected (see page 4, House Report No. 350), Congress could have intended, by the insertion at the last moment of the second sentence of Section 5, to diminish those rights in the manner now claimed by the Government.

B. *Statements of Committees and Members of the House and the Senate.* On April 27, 1924, Senator Shortridge in the Senate offered the amendment which in substance was embodied in Section 3, and by the terms of which there were excepted from the definition of immigrants "an alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation." He also offered an amendment in the following words:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-quota immigrant under the provisions of section 3."

Speaking of these two amendments he said:

> "These amendments recognize and *in no degree annul* any existing treaty of commerce and navigation." (65 Congressional Record, p. 5741). (Italics ours.)

Referring to Secretary Hughes' letter of February 8, 1924, addressed to Congress for the purpose of preventing an impairment of treaty rights, he said:

> "What Secretary Hughes feared was lest by this legislation we offend against existing treaties. We have avoided that altogether in the bill. [Congressional Record, Vol. 65, p. 5743] * * * the Secretary of State will now see clearly that we do not propose in this bill *in any wise to modify, annul, or disregard the provisions of the treaty of 1911.*" (Congressional Record, Vol. 65, p. 5744; italics ours.)

And again:

> "*Whatever rights are guaranteed to Japan under that treaty are to remain.* We are not disposed to question the terms of the treaty. There it is. This Nation has set its hand to it. There is the treaty, and there let it be, and let it be observed." (Congressional Record, Vol. 65, p. 5746; italics ours.)

And again:

> "* * * we respect not only this treaty but all existing treaties of commerce and navigation, as my proposed amendment specifically states." (Congressional Record, Vol. 65, p. 5806).

Senator Shortridge called attention specifically to the fact that when on February 8, 1924, the Secretary of State suggested that the bill in its then form was violative of treaty obligations, "the House bill did not contain the provision it now contains, and which I propose to incorporate in the Senate bill, namely, the provisions specifically stating that *it shall not interfere with the coming of any peoples who come under or pursuant to any treaty of commerce and navigation.*" (Congressional Record, Vol. 65, p. 5809; italics ours.)

On April 8, 1924, Senator Reed of Pennsylvania, who was in charge of the bill in the Senate, said that after consultation with the two Senators from California and the Senator from Arkansas, and with Congressman Johnson of Washington, who had charge of the bill in the House, and with others who had been active in the passage of the Immigration Law, he proposed an exclusion section which was "in accordance with the bill that already has passed the House." The amendment referred to contained the provision:

> "(c) No alien ineligible to citizenship shall be admitted to the United States unless such alien (1) is admissible as a non-immigrant under the

provisions of Section 3." (Congressional Record, Vol. 65, p. 6377.)

Expressions in the reports of the Committee on Immigration and Naturalization of the House of Representatives show that there was no intention to affect the treaty rights. In his letter of February 8, 1924, Mr. Hughes, the Secretary of State, had called attention to the effect upon the treaty rights of Japanese merchants under Article 1 of the treaty of Commerce and Navigation between the United States and Japan concluded in 1911, and his comment was that Section 12, subdivision (b) (subsequently enacted as Section 13, subdivision (c)), taken in connection with Sections 3 and 4 of the proposed bill "operates to exclude Japanese" and "establishes a statutory exclusion." (House Report No. 350, page 4.) Under the caption "Protection of Treaties" the Committee reported (p. 2):

> "The suggestions of Secretary Hughes for the protection of treaties of the United States with other countries have been met by the addition to section 3 (p. 5) of an additional exempted class, to-wit:
>
> "'(6) An alien entitled to enter the United States solely to carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation.'"

This is the exact form in which the exemption was stated in the bill as passed. The Committee adds (p. 6):

> "So far as concerns the treaty of 1911, the committee assumes that the modifications now made in the bill will remove the Secretary's objections, * * *."

Subsequently, on the floor of the House of Representatives, Mr. Johnson the Chairman of the Committee, stated:

> "We undertake to make full provision for • • • all who may want to come in under any of the provisions of any treaty we may have with the other nations of the world." (65 Congressional Record, 5649. See many other expressions of similar import, at pp. 5649, 5661, 8229 and 8233.)

It must, of course, be presumed that Committees and Members of Congress knew, when they passed the Act of 1924, what the rights of aliens under existing treaties were. Those rights were not *created* by the decisions of the Courts. They existed by virtue of the treaties themselves. In *In re Chung Toy Ho*, 42 Fed. 398 (C. C. Ore., 1890), *ante*, p. 4, the Court pointed out that wives and children of merchants belonged to the merchant class within the fair intendment of the Chinese treaty, and it is to that effect of the treaty to which members of Congress must be deemed to have referred in the expressions we have quoted above.

4. Interpretation of the law by administrative officials charged with its enforcement.

The views presented above find some confirmation in the interpretation which has already been placed upon the act of 1924 by the Secretary of State, the Secretary of Commerce, the Secretary of Labor and by the President himself. Under the provisions of Section 12, it is the duty of the three Secretaries referred to to report annually to the President the quota allotted to the several nationalities of the world. On the basis of reports thus made, the President on June 30, 1924, issued a proclamation putting the quotas into effect. These quotas were established only for those countries whose citizens were eligible to citizenship. It is true that a minimum quota of 100 was established for those countries whose inhabitants were not generally eligible to citizenship (*e. g.*, China), but this was not a minimum fixed in relation to aliens ineligible to citizenship, for in the proclamation the President expressly stated that

the minimum quota was to be "available only for persons born within the respective countries *who are eligible to citizenship* in the United States and admissible under the Immigration Laws of the United States." This interpretation clearly recognizes that there was no quota of any kind established for aliens not eligible to citizenship. The provision made by the President only related to those few cases where there might be aliens residing in China, for instance, who happened to be for some reason eligible to citizenship in the United States.

The general orders of the Bureau of Immigration of the United States Department of Labor also recognized that the quota system is not applicable to immigrants who are exempt under the provisions of Section 3. Referring to that section in the Second Supplement to General Order No. 30, under date of July 3, 1924, the Commissioner General has made the following provision:

> "Aliens of this class, while not required to present an immigration visa, must be possessed of a regular passport bearing the Consul visa."

In other words an alien of the class referred to must have a passport similar to that required from any foreigner not subject to quota provisions.

In the Third Supplement to the General Order, under date of August 1, 1924, it is provided as follows:

> "2. No alien shall be admitted to the United States as a non-immigrant unless such alien shall present to the proper immigration official, at the port of arrival, a passport visa duly issued and authenticated by an American consular officer; * * *."

It is significant that in this same order it is provided as follows:

> "1. No immigrant whether a quota immigrant or non-quota immigrant of any nationality shall be admitted to the United States unless such immigrant shall present to the proper immigration of-

> ficial, at the port of arrival, an immigration visa duly issued and authenticated by an American consular officer; * * *."

Thus, the distinction between an immigration visa in the case of those coming within the quota provisions of the act and the passport visa applicable to aliens who are not immigrants and who are exempt under Section 3, seems to be accepted by the Bureau of Immigration. Some confusion seems to have existed in the Bureau, and on October 27, 1924, the Commissioner General issued the following order as the Seventh Supplement to General Order No. 30, namely:

> "As the Fourth Supplement to General Order No. 30 directing that surrendered immigration visas be forwarded to the Bureau of Naturalization, Department of Labor, Washington, D. C., *has no practical application to persons of races ineligible to citizenship, it is, therefore, directed that the surrendered immigration visas of such persons be retained at the ports where surrendered.*" (Italics ours.)

These references serve to show that the two systems of exclusion already referred to are independent of each other.

5. Decisions of the lower courts under the Immigration Act of 1924.

The District Court in the case at bar admitted the strength of the argument that "husbands and wives and their children have a natural right to be and reside with one another, a right universallly recognized and enforced by municipal laws", but he added that such right must of necessity give way to the sovereign right of a state to dictate what alien persons should "be permitted to come within its territorial boundaries." Without much amplification of reasoning and with scarcely more than a reference to the several sections of the Immigration Act of 1924, the court concluded that a careful consideration of Section 5, "convinces me that the

construction of subdivision (6) of Section 3 thereof, upon which the contention is founded, has been by Congress excluded *ex industria.*" The attention of the court was not apparently called to the two systems of exclusion discussed above, and the decision was based upon a narrow interpretation of the phraseology of two sections of the act, without consideration of its general scope and purpose.

Two other decisions deserve notice. In *Ex Parte Goon Dip,* 1 Fed. (2d) 811 (District Court, W. D. Washington, 1924), a question arose as to whether the wife or minor children of a resident Chinese merchant were excluded by the provisions of the act of 1924. Judge Neterer reviewed the decisions prior to the passage of the act holding that the wife and minor children of Chinese merchants were admissible in spite of the Chinese Exclusion Act, and after an examination of the several provisions of the act, concluded as follows, viz. (p. 813):

> "The report of the committee and the express provisions of the act clearly show the intent of the Congress not to disturb the relations existing under the prior law and treaty. I think that this act and the treaty and 'immigration law' and prior judicial construction of the treaties and law and departmental construction must all be considered together, and under such consideration the court will be slow to assume that Congress intended to treat the treaty stipulations as a 'scrap of paper'."

In *Ex Parte So Hakp Yon,* 1 Fed. (2d) 814 (1924), decided the day after the decision in *Ex Parte Goon Dip,* the same Judge held that the wife of a Japanese merchant was not admissible under Section 13 of the Immigration Act of 1924 because the provisions of the treaty with Japan of April 5, 1911, were not such that they could be reasonably interpreted as intended to permit the entry of wives of Japanese merchants. The

court distinguished between the Chinese Exclusion Act of 1880 which provided for the admission of "Chinese * * * merchants * * * together with their body and household servants", and the Japanese treaty of April 5, 1911, which provided as follows (Article I, 37 Stat., 1504):

> "The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other, to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established."

A consideration of this treaty is not involved in the case at bar, but it is proper to say that the interpretation of the District Judge is not consonant with the liberality of interpretation approved by the decisions above referred to, rendered before the passage of the act of 1924. The right "to enter, travel and reside" and "to own or lease and occupy houses", and to "lease land for residential * * * purposes", and "generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects * * *" is even more comprehensive and more inclusive than the words "together with their body and household servants" employed in the Chinese Exclusion Treaty. All of the arguments of Judge Deady in *In Re Chung Toy Ho* (*supra,*) concurred in by this Court in *United States* v. *Mrs. Gue Lim, supra,* ought to have led to a broader interpretation than that of Judge Neterer in the *So Hakp Yon* case. Furthermore, for reasons already fully set forth in our argument above, Judge Neterer failed to give weight to

the two systems for admission of aliens into this country. He said [1 Fed. (2d), at p. 815]:

> "This section [5] expressly excludes the wife, as the husband is a *non-quota immigrant*, and *she may not be admitted by reason of such relationship.*" (Italics ours.)

This, for the reasons we have already sufficiently stated, shows that the District Judge incorrectly assumed that the husband was a non-quota immigrant, whereas, under Section 3, he was not an immigrant at all.

POINT II.

For these reasons it is respectfully submitted that the question certified by the Circuit Court of Appeals should be answered in the negative.

HENRY W. TAFT,
Amicus Curiae.

New York, March 20th, 1925.